will receive a grade B signal, and 2) presumed antenna height. PrimeTime alleges that Plaintiffs used favorable assumptions in generating the Longley-Rice maps admitted into testimony before the Magistrate Judge (50% of households, and antenna height of 30 feet). PrimeTime requests that the Court set the parameters of the model so that the maps do not overly favor Plaintiffs.

For several reasons, the Court rejects PrimeTime's request to alter the method by which to create the Longley-Rice maps. First, the evidence before the Court indicates that the method Plaintiffs' experts used to create the Longley-Rice maps is the standard method relied upon by engineers and specified by the Federal Communications Commission. See FCC, Office of Engineering and Technology Bulletin No. 69; Supp. Cohen Dep. May 29, 1998; Cohen Dep. March 11, 1997. Congress expressly provided in the SHVA that "a signal of grade B intensity" was as defined by the FCC. See supra note 2, at 4.

Second, PrimeTime's suggested change in the method to create Longley-Rice maps will create issues that a single standardized method will avoid.[2] Plaintiffs' expert Jules Cohen has submitted an affidavit stating that he had never seen PrimeTime's approach to

[2] PrimeTime submitted a map changing two of Plaintiffs assumptions (97% of households, antenna height of 20 feet).

creating a Longley-Rice map.

Third, in Mr. Cohen affidavit, he notes the accuracy of the FCC Longley-Rice procedure in predicting which households will actually receive a signal of Grade B intensity is confirmed by actual test results Plaintiffs have obtained from more than 500 PrimeTime subscribers in five different markets. See Supp. Cohen Dep. May 29, 1998. Therefore, the Court declines PrimeTime's invitation to alter the standard variables used to create Longley-Rice maps.

Next, PrimeTime has raised issues as to who should create the Longley-Rice maps. The May 13, 1998 Order did not address this issue because it is self evident. The burden of abiding with by the injunction which includes utilizing the Longley-Rice maps are upon PrimeTime.

In regards to how PrimeTime will be able to determine where potential subscribers live in relation to the maps, Plaintiffs point out that computer software exists which will enable PrimeTime to "geocode" particular addresses to particular locations and determine whether the subscriber lives within an area which can receive a signal of grade B intensity.[3] PrimeTime itself

[3] Geocoding was utilized in the maps submitted before the Magistrate Judge.

recognizes that this software exists, but raises an issue as to its reliability. However, any problems with reliability does not convince this Court that the injunction is inadvisable. PrimeTime can individually test those households that it believes are incorrectly found to be served according to the Longley-Rice map. Furthermore, as mentioned above, PrimeTime has 90 days within which to comply with the injunction.

C. Cable Rule

Plaintiffs' proposed preliminary injunction order states that Defendant shall not "provide plaintiffs' network programming to any customer living in a household at which service is available from a local cable system without first obtaining written confirmation from the cable system that the household has not subscribed to cable in the previous 90 days." If the cable company has not responded to PrimeTime within 30 days, PrimeTime can accept the subscriber's oral confirmation of the household's cable status.[4]

PrimeTime argues that the preliminary injunction order should not contain any provision regarding cable television because this is a peripheral issue to which no evidence has been adduced.

[4] Plaintiffs added this provision in answer to PrimeTime's objection that cable companies would profit from not responding to PrimeTime's requests in a timely manner.

Plaintiffs state that evidence was presented to the Magistrate Judge as to investigations which revealed that PrimeTime was providing services to individuals that have subscribed to cable in the 90 days prior to subscribing to PrimeTime.

The second prong of SHVA's definition of an "unserved household" includes a household that - "has not, within 90 days before the date on which that household subscribes [for PrimeTime programming] . . . subscribed to a cable system that provides the signal of a primary network station affiliated with that network." 17 U.S.C. § 119(d)(10)(B). Thus, the limited statutory license available to PrimeTime under the SHVA does not include transmissions to persons who have subscribed to cable within 90 days of signing up for PrimeTime's services.

In the Report and Recommendation, the Magistrate Judge noted in a footnote that

> "PrimeTime also provides service to households that have recently subscribed to cable television. For example, a sample taken in Tallahassee reveals that approximately one-third of PrimeTime subscribers had subscribed to cable in the 90 days prior to subscribing to PrimeTime 24. In addition, an investigator retained by plaintiffs was able to sign up for PrimeTime 24 even after specifically telling the PrimeTime 24 representative that the household currently subscribed to cable."

Report at 16-17 n.9 (citations omitted). However, the focus of the Report and the Court's May 13, 1998 Order was upon PrimeTime's

disregard for the first prong of the definition "unserved households", households that cannot receive a signal of grade B intensity or better.

Since this issue was not fully developed before the Magistrate Judge, at this juncture the Court deems it appropriate not to include any verification other than that which is presently being utilized (i.e. questionnaire to potential PrimeTime subscribers). This clarification does not preclude the parties from more fully developing this issue at the trial on the merits.

D. Consent and Testing Provisions of Plaintiffs' Proposed Injunction

In Plaintiffs' proposed order there is a provision that allows PrimeTime to provide network service to a person who resides in an area that can receive a signal of grade B or better if: 1) PrimeTime obtains consent in writing by the network and the network affiliate, or 2) PrimeTime provides 15 days notice of its intent to conduct a signal strength test, and the test is conducted in accordance with the procedures outlined in the Declaration of Jules Cohen, filed on March 11, 1997 and the test shows that the household cannot receive a signal of grade B intensity.[5]

---

[5] PrimeTime argues that it has previously been the practice in the industry that it is sufficient for the affiliate alone to consent (and not the network and affiliate). During the Court's

PrimeTime raises a new issue in its Motion for Clarification and requests that the injunction prohibit an affiliate from unreasonably withholding its consent and require that the affiliate respond in writing as to a request for consent within 30 days.

Plaintiffs counter by arguing that network stations and affiliates should not be required to consent to delivery of PrimeTime's services to "served" households, and no such consent is required under the statute. In addition, Plaintiffs point out that PrimeTime's proposal would require the Court to adjudicate disputes as to whether Plaintiffs have denied consent in bad faith.

The Court agrees that neither the SHVA nor any evidence submitted before the Court supports the requirement that Plaintiffs cannot withhold its consent to PrimeTime's rebroadcasts of Plaintiffs' programming. The SHVA grants PrimeTime a limited statutory license to rebroadcast network programming to "unserved households". Plaintiffs have no obligation to allow a satellite carrier (PrimeTime) to retransmit its broadcasting unless the household falls within the statutory license. Thus, PrimeTime's

---

hearing, Plaintiffs counsel did not object to a modification wherein PrimeTime could obtain consent solely from an affiliate. The Court finds no reason that the consent provision such mandate consent by both the network and the affiliate. Consent by the affiliate is sufficient to guard Plaintiffs rights under the SHVA.

proposal will not be part of the Court's injunction.

In addition, PrimeTime argues that the procedures set forth in the Cohen declaration should not be the only permissible form of signal intensity testing. PrimeTime requests that testing be permitted at the individuals household, not along a 100 foot run in the nearest publicly accessible street, and that the testing antenna height be set at five feet above the roof line of the particular house and not at 30 feet in the air.

Plaintiffs argue that PrimeTime's proposed changes to the method used to perform signal strength tests does not conform with the FCC's standardized testing procedure. Moreover, Plaintiffs maintain that with PrimeTime's proposed changes, discrepancies may arise as to the height of a particular household's antenna.

As stated in the Court's May 13, 1998 Order, the FCC established signal intensity testing procedures in 47 C.F.R. § 73.686. Although such testing procedures were not developed specifically for use under the SHVA, Congress endorsed the FCC method of defining a signal of grade B intensity. Thus, the Court will not tinker with the FCC's approach.

II. DirecTV's Motion for Clarification

DirecTV filed a motion for clarification because the Court's

May 13, 1998 Order stated that under 65(d) of the Federal Rules of Civil Procedure, an injunction against PrimeTime applies to PrimeTime's distributors (DirecTV is PrimeTime's largest distributor).

Many of the issues raised in DirecTV's Motion mirrors those raised by PrimeTime and addressed above. Although DirecTV has presented a few innovative arguments, the Court does not find it necessary to address these points. DirecTV does, however, also request clarification of the Court's finding that under Rule 65(d) of the Federal Rules of Civil Procedure it is an agent or person in active concert or participation with PrimeTime. DirecTV asserts that it is not an agent of PrimeTime.

The Court's May 13, 1998 Order clearly did not find that DirecTV was PrimeTime's agent. The Court's language was in the alternative and essentially held that as PrimeTime's largest distributor, it is subject to the injunction under Federal Rules of Civil Procedure 65(d). However, to further clarify the Court's ruling the Court finds that DirecTV is subject to the injunction under 65(d) of the Federal Rules of Civil Procedure, but makes no finding that DirecTV is an agent of PrimeTime.[6]

---

[6] DirecTV also requests that the Court impose an enforcement mechanism provided by the Satellite Home Viewers Act, 17 U.S.C. § 119(a)(5)(D). However, this section was transitional and ceased

III. DirecTV's Application for Bond

DirecTV requests that the Court order Plaintiffs to post an adequate bond to protect its customers and DirecTV. DirecTV maintains that it is entitled to a bond even though it is not a party because the injunction will restrain DirecTV's actions.

In support, DirecTV cites Commonwealth of Puerto Rico v. Price Comm'n, 342 F. Supp. 1311 (D.P.R. 1972) among other cases. However, in Price, the Court denied a third party's request for a bond because it was not a party and was not subject to the injunction. Undeterred, DirecTV stresses that unlike the non-party in Price, DirecTV is subject to the injunction under Fed. R. Civ. P. 65(d).

Rule 65(c) of the Federal Rules of Civil Procedure states that: "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Fed R. Civ. P. 65(c)

---

to be effective as of the end of 1996. See Satellite Home Viewer Act of 1994, Pub. L. No. 103-369, §6(c), 108 Stat. 3477, 3481 (1994) ("The provisions of section 119(a)(8) of title 17 . . . relating to transitional signal intensity measurements, shall cease to be effective on December 31, 1996.") During oral argument, DirecTV has admitted that this section is no longer applicable. Thus, this enforcement method will not be imposed.

(emphasis added). The language of the statute speaks only of "parties". DirecTV is not a party to this action. Thus, although the scope of the injunction includes DirecTV, under Fed R. Civ. P. 65(c), under Fed R. Civ. P. 65(d), the Court need not require Plaintiffs to post security for any damages to DirecTV. Therefore, DirecTV's Application for Bond is **DENIED**.[7]

IV. PrimeTime's Application for Bond

A. Standard

In determining the amount of a preliminary injunction bond, a court must keep in mind that the underlying purpose of the preliminary injunction bond is to protect the restrained or enjoined party against costs and damages suffered if the party is subsequently found to be wrongfully restrained or enjoined. Flag Fables, Inc. v. Jean Ann's Country Flags and Crafts, Inc., 753 F. Supp. 1007, 1019 (D. Mass. 1990). The amount of bond is a matter within the sound discretion of the district court, Carillon Importers, Ltd. v. Frank Pesce Int'l Group Ltd., 112 F.3d 1125, 1127 (11th Cir. 1997).

Courts have considered a number of factors in determining the

[7] It is also significant that DirecTV had notice of this litigation and did not attempt to intervene.

amount of a bond including: the amount of damages the enjoined party may suffer as a result of the injunction,[8] the expected length of the preliminary injunction,[9] and the hardship a bond requirement would impose on the applicant.[10]

However, Plaintiffs have directed the Court to numerous cases where bonds were set at a fraction of the losses predicted by defendants. See, e.g., Michaels v. Internet Entertainment Group, Inc., 1998 WL 211257 (C.D. Cal. April 27, 1998) (setting bond at $50,000 despite defendant's claim of millions of dollars of losses from injunction against infringement of copyrighted videotape); Budish v. Gordon, 784 F. Supp. 1320, 1338 (N.D. Ohio 1992) (setting bond at $50,000 despite defendant's request for $3 million bond for preliminary injunction against infringement of plaintiff's copyright in book).

The Court finds that several factors support a bond of $300,000. First, Plaintiffs have demonstrated a substantial

---

[8] See Sundor Brands, Inc. v. Borden Inc., 653 F. Supp. 86, 93 (M.D. Fla. 1986).

[9] See Itar-Tass Russian News Agency v. Russian Kurier, Inc., 886 F. Supp. 1120, 1131 (S.D.N.Y. 1995).

[10] See Flag Fables, Inc. v. Jean Ann's Country Flags and Crafts, Inc., 730 F. Supp. 1165, 1176 (D. Mass. 1989).

likelihood of success on the merits.[11] Secondly, this action is set for trial in August, and as PrimeTime has 90 days within which to comply with the injunction, the trial will most likely have ended by the time PrimeTime must comply with the injunction.

Third, dispositive motions have recently been filed which may obviate any need for this action to go to trial. Fourth, a majority of the damages PrimeTime will incur results from their persistence in signing up a large number subscribers in violation of the SHVA even after the Magistrate Judge ruled in Plaintiffs' favor.

Fifth, PrimeTime's representations of in losses are based upon unsupportable assumptions. PrimeTime assumes a 90% loss of the affected subscribers. However, considering that the injunction prohibits PrimeTime from broadcasting only CBS and Fox programming to households that do not fall within the definition of "unserved", such an assumption is untenable. PrimeTime's programming contains a large number of channels. The elimination of merely two channels is not likely to result in a 90% loss of viewers. PrimeTime's projected loss of advertising is also tainted because it is premised upon a 90% loss of subscribers.

---

[11] The Court emphasizes that PrimeTime knew of the governing legal standard and nevertheless chose to circumvent it. May 13, 1998 Order, D.E. #193, at 29.

Thus, as in Budish v. Gordon, 784 F. Supp. 1320, 1338 (N.D. Ohio 1922), equitable considerations "militate[] against a high bond." PrimeTime was on notice that its efforts to comply with the SHVA were insufficient, however, it continued to sign up over a million new subscribers even after Plaintiffs filed their motion for preliminary injunction and the Magistrate Judge recommended granting the motion. See also id. (equitable considerations "militate[d] against a high bond" where the defendants (who were sued for copyright infringement based on their publication of a book) continued to print 100,000 copies of a second edition of the book after the lawsuit was filed).

Accordingly, the Court finds that Plaintiffs shall post a $300,000 bond as security under 65(c) of the Federal Rules of Civil Procedure.

CONCLUSION

For the aforementioned reasons, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. **PrimeTime's Motion for Hearing on its Memorandum With Respect to Preliminary Injunction Bond (D.E. #196) is DENIED as moot.**
2. **PrimeTime's Motion for Clarification and for Hearing (D.E. #196) is GRANTED in part and DENIED in part as provided in this Order.**
3. **PrimeTime's Motion for Hearing on Motion for Clarification**

(D.E. #198) is **DENIED as moot.**

4. Non-Party DirecTV's Motion for Clarification (D.E. #204) is **GRANTED in part and DENIED in part** as provided in this Order.

5. DirecTV's Request for Hearing on its Motion for Clarification (D.E. #206) is **DENIED as moot.**

6. DirecTV's Application for Bond Pursuant to Fed.R.Civ.P. 65 (D.E. #226) is **DENIED.**

7. DirecTV's Request for Hearing on its Application for Bond (D.E. #224) is **DENIED as moot.**

8. Plaintiffs' Motion for Leave to file Surreply to Correct Factual Inaccuracy in Defendant's Reply (D.E. #218) is **DENIED** as **moot.**

9. As indicated in the Court's Supplemental Order Granting Plaintiffs' Motion for Preliminary Injunction dated July 10, 1998, within (3) three days of the date of this order, Plaintiffs shall post an injunction bond of $300,000 pursuant to Fed. R. Civ. P. 65(c).

DONE and **ORDERED** in Chambers, Miami, Florida, this 10 day of July, 1998.

Lenore C. Nesbitt

LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

cc: **David M. Rogero, Esq.**
Akerman, Senterfitt & Eidson, P.A.
One Southeast Third Avenue
Miami, FL 33131

Thomas P. Olson, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20036

Neil K. Roman, Esq.
Covington & Burling
1201 Pennsylvania Ave., N.W.

P.O. Box 7566
Washington, D.C. 20044-7566

Brian F. Spector, Esq.
Kenny Nachwalter Seymour Arnold Critchlow & Spector, P.A.
1100 Miami Center
201 South Biscayne Blvd
Miami, FL 33131-4327

Andrew Z. Schwartz, Esq.
Foley, Hoag & Elliot LLP
One Post Office Square
Boston, MA 02109